

Notice of Allowability

Application No.

09/606,961

Examiner

Eric B. Kiss

Applicant(s)

RODRIGUES ET AL.

Art Unit

2192

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address--

All claims being allowable, PROSECUTION ON THE MERITS IS (OR REMAINS) CLOSED in this application. If not included herewith (or previously mailed), a Notice of Allowance (PTOL-85) or other appropriate communication will be mailed in due course. **THIS NOTICE OF ALLOWABILITY IS NOT A GRANT OF PATENT RIGHTS.** This application is subject to withdrawal from issue at the initiative of the Office or upon petition by the applicant. See 37 CFR 1.313 and MPEP 1308.

1. ☒ This communication is responsive to the terminal disclaimers filed 01 November 2005.
2. ☒ The allowed claim(s) is/are 1-27.
3. ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
 - a) ☐ All b) ☐ Some* c) ☐ None of the:
 1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this national stage application from the International Bureau (PCT Rule 17.2(a)).


* Certified copies not received: _____.

Applicant has THREE MONTHS FROM THE "MAILING DATE" of this communication to file a reply complying with the requirements noted below. Failure to timely comply will result in ABANDONMENT of this application.
THIS THREE-MONTH PERIOD IS NOT EXTENDABLE.

4. ☐ A SUBSTITUTE OATH OR DECLARATION must be submitted. Note the attached EXAMINER'S AMENDMENT or NOTICE OF INFORMAL PATENT APPLICATION (PTO-152) which gives reason(s) why the oath or declaration is deficient.
5. ☐ CORRECTED DRAWINGS (as "replacement sheets") must be submitted.
 - (a) ☐ including changes required by the Notice of Draftsperson's Patent Drawing Review (PTO-948) attached
 - 1) ☐ hereto or 2) ☐ to Paper No./Mail Date _____.
 - (b) ☐ including changes required by the attached Examiner's Amendment / Comment or in the Office action of Paper No./Mail Date _____.Identifying indicia such as the application number (see 37 CFR 1.84(c)) should be written on the drawings in the front (not the back) of each sheet. Replacement sheet(s) should be labeled as such in the header according to 37 CFR 1.121(d).
6. ☐ DEPOSIT OF and/or INFORMATION about the deposit of BIOLOGICAL MATERIAL must be submitted. Note the attached Examiner's comment regarding REQUIREMENT FOR THE DEPOSIT OF BIOLOGICAL MATERIAL.

Attachment(s)

1. ☐ Notice of References Cited (PTO-892)
2. ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3. ☐ Information Disclosure Statements (PTO-1449 or PTO/SB/08), Paper No./Mail Date _____
4. ☐ Examiner's Comment Regarding Requirement for Deposit of Biological Material
5. ☐ Notice of Informal Patent Application (PTO-152)
6. ☒ Interview Summary (PTO-413), Paper No./Mail Date 20060117
7. ☒ Examiner's Amendment/Comment
8. ☒ Examiner's Statement of Reasons for Allowance
9. ☐ Other _____


TUAN DAM
SUPERVISORY PATENT EXAMINER

EXAMINER'S AMENDMENT

1. An examiner's amendment to the record appears below. Should the changes and/or additions be unacceptable to applicant, an amendment may be filed as provided by 37 CFR 1.312. To ensure consideration of such an amendment, it MUST be submitted no later than the payment of the issue fee.

Authorization for this examiner's amendment was given in a telephone interview with Robert A. Kalinsky (Reg. No. 50,471) on 17 January 2006.

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2. The application has been amended as follows:

- a. Please insert the following complete line of text between lines 2 and 3 of Claim 1:
a processor unit;
- b. Please replace “**data product**” in the first line of Claim 18 with **storage medium**.
- c. Please replace “**data product**” in the first line of Claim 19 with **storage medium**.
- d. Please replace “**data product**” in the first line of Claim 20 with **storage medium**.
- e. Please replace “**data product**” in the first line of Claim 21 with **storage medium**.
- f. Please replace “**data product**” in the first line of Claim 22 with **storage medium**.
- g. Please replace “**data product**” in the first line of Claim 23 with **storage medium**.
- h. Please replace “**data product**” in the first line of Claim 24 with **storage medium**.
- i. Please replace “**data product**” in the first line of Claim 25 with **storage medium**.
- j. Please replace “**data product**” in the first line of Claim 26 with **storage medium**.

- k. Please replace “**data product**” in the first line of Claim 27 with **storage medium**.

--END OF AMENDMENT--

3. The following is an examiner's statement of reasons for allowance:

The terminal disclaimer filed on 01 November 2005 disclaiming the terminal portion of any patent granted on this application which would extend beyond the expiration date of U.S. Patent No. 6,754,612 has been reviewed and is accepted. The terminal disclaimer has been recorded.

The terminal disclaimer filed on 01 November 2005 disclaiming the terminal portion of any patent granted on this application which would extend beyond the expiration date of U.S. Patent No. 6,873,934 has been reviewed and is accepted. The terminal disclaimer has been recorded.

The rejections based on the judicially-created doctrine of obviousness-type double patenting are withdrawn in view of the terminal disclaimers.

Regarding "permanently inserted performance markers", Applicant has stated,

[P]ermanently inserted performance markers are intended to be in the final version of an application program that is ultimately delivered to end users. The permanently inserted performance markers impose little, if any, overhead to operate and thus are not removed from the application program when testing of the application is completed.

In addition, the application program is configured to call performance code marker module each time one of the permanently inserted performance markers is reached. If run-time internal state data is not being collected, the performance code marker module simply returns to the calling application program.

Application, p. 15, l. 10 – p. 16, l. 3. In this manner, permanently inserted performance markers allow performance testing on a version of the application program that is identical to the version that is ultimately considered the delivered product, thereby enhancing the reliability of such testing.

Applicant's Remarks filed 27 June 2005, p. 7.

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Applicant has noted that, “Roediger teaches away from the inclusion of instrumented code in the delivered product and therefore does not suggest permanently inserted performance markers.” Applicant’s Remarks filed 27 June 2005, p. 8 (underlining in original).

Applicant has further noted,

The system disclosed by Roediger . . . suffers from the same problem as other systems in that, when profiling is disabled, sections of instrumented code are skipped. **The skipping of instrumented code by the program creates performance differences between the program with instrumentation enabled and the program with instrumentation disabled, thereby resulting in unreliable testing.** See Application, p. 2, l. 3 – p. 3, l. 2.

In sharp contrast, claim 1 recites that the application program calls the performance code marker module each time one of the permanently inserted performance markers is reached. In this manner, the application program performs in a similar manner whether or not run-state data is collected, thereby enhancing the reliability of performance testing.

Applicant’s Remarks filed 27 June 2005, p. 9 (underlining in original; boldface added for emphasis).

From the foregoing analysis, it is clear that the system of claim 1 aims to achieve the same performance (as decreased by the overhead associated with calls to the performance code marker module) regardless of whether performance monitoring is desired or not. In this manner, the prior art of record, which aims to remove unnecessary overhead associated with unneeded performance monitoring instrumentation by removing/disabling the instrumentation, does not achieve the same “reliability of performance testing” that Applicant is concerned with. Indeed, removing unnecessary overhead may cause the resulting system to run faster than the previously benchmarked system (a situation that Applicant apparently considers undesirable).

Independent claims 13 and 18, while worded slightly differently from claim 1, nonetheless recite, “determining if run-time internal state is to be collected at each code marker

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by calling a performance code marker module.” Thus, these claims also require the application program to call the performance code marker module each time one of the permanently inserted performance markers is reached, thereby incurring the same module-call overhead regardless of whether performance monitoring is desired or not at the affected program locations. As is recited in claims 13 and 18, these module calls are required in order to determine if the run-time internal state data is to be collected at each code marker. For the same reasons stated above with regard to claim 1, claims 13 and 18 are allowable over the prior art of record.

Claims 2-12, 14-17, and 19-27 are considered allowable at least by virtue of their dependence from independent claims 1, 13, and 18.

4. Any comments considered necessary by applicant must be submitted no later than the payment of the issue fee and, to avoid processing delays, should preferably accompany the issue fee. Such submissions should be clearly labeled “Comments on Statement of Reasons for Allowance.”

Conclusion

5. Any inquiry concerning this communication or earlier communications from the Examiner should be directed to Eric B. Kiss whose telephone number is (571) 272-3699. The Examiner can normally be reached on Tue. - Fri., 7:00 am - 4:30 pm. The Examiner can also be reached on alternate Mondays.


If attempts to reach the Examiner by telephone are unsuccessful, the Examiner’s supervisor, Tuan Dam, can be reached on (571) 272-3695. The fax phone number for the organization where this application or proceeding is assigned is (571) 273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Any inquiry of a general nature should be directed to the TC 2100 Group receptionist:
571-272-2100.

EBK / EBK
January 20, 2006



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